



In the Supreme Court of the United States

OCTOBER TERM, 1979

No. **79-631**

THE STATE OF OKLAHOMA,

Petitioner,

VERSUS

C. M. G., a juvenile,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE
STATE OF OKLAHOMA**

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October, 1979

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*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

The Attorney General of the State of Oklahoma, on behalf of the State of Oklahoma, the Petitioners herein, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Oklahoma entered in the above case on May 1, 1979.

OPINIONS BELOW

The Opinion of the Court of Criminal Appeals of the State of Oklahoma is reported at 594 P.2d 798 (Okla.Cr. 1979), and is printed in Appendix "A" hereto, *infra*, page A-1.

JURISDICTION

The judgment of the Court of Criminal Appeals of the State of Oklahoma was entered on May 1, 1979. A timely Petition for Rehearing was denied July 23, 1979, and is printed in Appendix "B" hereto, *infra*, page B-1. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the jurisdiction transferred from the Territorial courts to the State of Oklahoma included jurisdiction of crimes committed between members of the same Indian tribe but not on land over which that tribe had jurisdiction.

2. Whether the land on which the Chilocco Indian School is located is "Indian country" within the meaning of 18 U.S.C. § 1151(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS

"18 USC § 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the

limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including right-of-way running through the same.

"Act of May 2, 1890, ch. 182, § 9, 26 Stat. 81. Judicial power, in whom vested—Jurisdiction of probate courts and justices of the peace—Jurisdiction of supreme and district courts—Supreme court to define judicial districts—Unorganized territory—Appeals from district courts, when—Appeals from supreme court, allowed when—Additional jurisdiction of district courts—Cherokee Outlet—Supreme and district courts may issue writs of mandamus.

That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace. The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum. They shall hold their offices for four years, and until their successors are appointed and qualified, and they shall hold a term annually at the seat of government of said Territory. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of the justices of the peace, shall be as limited by law.

"Act of May 2, 1890, ch. 182, § 12, Stat. 81. Extending jurisdiction of district courts over Indians in Oklahoma.

That jurisdiction is hereby conferred upon the district courts in the territory of Oklahoma over all controversies arising between members or citizens of one tribe or nation of Indians and the members or citizens of other tribes or nations in the Territory of Oklahoma, and any citizens or member of one tribe or nation who may commit any offense or crime in said Territory against the person or property of a citizen or member

of another tribe or nation shall be subject to the same punishment in the Territory of Oklahoma as he would be if both parties were citizens of the United States; and any person residing in the Territory of Oklahoma, in whom there is Indian blood, shall have the right to invoke the aid of courts therein for the protection of of his person or property, as though he were a citizen of the United States: Provided, that nothing in this act contained shall be so considered as to give jurisdiction to the courts established in said Territory in controversies arising between Indians of the same tribe, while sustaining their tribal relation.

“Act of May 2, 1890, ch. 182, § 29, 26 Stat. 81. Boundaries of Indian Territory proper—Establishing a court.

That all that part of the United States which is bounded on the north by the state of Kansas, on the east by the states of Arkansas and Missouri, on the south by the state of Texas, and on the west and north by the Territory of Oklahoma as defined in the first section of this Act, shall for the purposes of this Act, be known as the Indian Territory; and the jurisdiction of the United States court established under and by virtue of an Act entitled ‘An Act to establish a United States court in the Indian Territory, and for other purposes,’ approved March first, eighteen hundred and eighty-nine, is hereby limited to and shall extend only over the Indian Territory as defined in this section; that the court established by said Act shall, in addition to the jurisdiction conferred thereon by said Act, have and exercise within the limits of the Indian Territory jurisdiction in all civil cases in the Indian Territory, except cases over which the tribal courts have exclusive jurisdiction; and in all cases on contracts entered into by citizens of any tribe or nation with citizens of the United States in good faith and for valuable consideration, and in accordance with the laws of

such tribe or nation, and such contracts shall be deemed valid and enforced by such courts; and in all cases over which jurisdiction is conferred by this Act or may hereafter be conferred by Act of congress; and the provisions of this Act hereinafter set forth shall apply to said Indian Territory only.

“Act of June 16, 1906, ch. 3335, § 17, 34 Stat. 267. Determination of State cases in supreme court—Review, etc.

That all causes, proceedings and matters, civil or criminal, pending in the supreme court of the Territory of Oklahoma, or in the United States court of appeals in the Indian Territory, not transferred to the United States circuit or district courts in said State of Oklahoma shall be proceeded with, held, and determined by the supreme court or other final appellate court of such State as the successor of said supreme court of the Territory of Oklahoma and of the United States court of appeals in the Indian Territory, subject to the same right to review upon appeal or writ of error to the Supreme Court of the United States now allowed from the supreme or final appellate court of a State under existing laws.

“Act of June 16, 1906, ch. 3335, § 20, 34 Stat. 267. Trial of cases, etc., pending in district and Indian Territory courts not transferred—Appeals, etc.—Pending criminal cases.

That all causes, proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma Territory, or in the United States courts in the Indian Territory, at the time said Territories become a State not transferred to the United States circuit or district courts in the State of Oklahoma, shall be proceeded with, held and determined by the courts of said State the successors of said district courts of the Territory

of Oklahoma, and the United States courts in the Indian Territory; with the right to prosecute appeals or writs of error to the supreme or appellate court of said State, and also with the same right to prosecute appeals or writs of error from the final determination in such cases made by the supreme or appellate court of such State to the Supreme Court of the United States, as is provided by law for appeals and writs of error from the supreme or [for] final appellate court of a State to the Supreme Court of the United States. All criminal cases pending in the United States courts in the Indian Territory not transferred to the United States circuit or district courts in the State of Oklahoma, shall be prosecuted to a final determination in the State courts of Oklahoma, under the laws now in force in that Territory."

STATEMENT OF CASE

On January 16, 1978, the State of Oklahoma filed a Petition in the Juvenile Division of the District Court of Kay County, Oklahoma, alleging that the Respondent, a fifteen (15) year old Ponca Indian male and another juvenile committed the act of murder in the Second Degree by beating to death a nineteen (19) year old Ponca Indian male in the dormitory room of the victim at the Chilocco Indian School (Case No. FRJ-78-4). On January 20, 1978, an Amended Petition was filed charging the Respondent with Murder in the First Degree.

On May 4, 1978, the District Court of Kay County certified the Respondent as an adult pursuant to Oklahoma law. The federal question involved here was first raised when the Respondent filed a Motion to Dismiss asserting that the alleged crime occurred on Indian country and

therefore, the State court lacked jurisdiction to hear this case. On June 4, 1978, the District Court ruled that the State had jurisdiction to prosecute the crime charged and transferred the case to the criminal division of the District Court of Kay County.

The Respondent appealed the June 4, 1978 Order of the District Court, which had overruled his Motion to Dismiss for lack of jurisdiction, to the Court of Criminal Appeals of the State of Oklahoma, the Court of last resort for appeals in criminal cases. On May 1, 1979, that court reversed the decision of the District Court of Kay County and remanded the case with instructions to dismiss (Case No. J-78-362, printed in Appendix "A"). A timely Petition for Rehearing was denied July 23, 1979 (Printed in Appendix "B").

REASONS FOR GRANTING THE WRIT

The Petitioners contend that the opinion of the Court of Criminal Appeals of the State of Oklahoma misinterprets Federal law and decides a substantial federal question which has not been previously decided by this Court and in a manner which is inconsistent with the prior decisions of this Court on related issues. Further, the decision is in conflict with a decision of the United States Court of Appeals for the Tenth Circuit.

The opinion which is the subject of this Petition holds that the land on which Chilocco Indian School is located is a "dependent Indian community" and, therefore, "Indian country" as defined by 18 U.S.C. § 1151(b). Consequently, it was determined that the State had no jurisdiction to

prosecute any criminal action committed by Indians, against Indians at the Chilocco Indian School.

The land on which Chilocco Indian School is located was at one time owned by the Cherokee Indian Tribe and is located in that part of the Cherokee land which constituted the Cherokee Outlet prior to inclusion in the Oklahoma Territory and ultimately the State of Oklahoma. In 1884 the Cherokee Tribe sold their right, title and interest in this land to the Federal Government which established a federal enclave within which was located an industrial school for Indian children as well as homestead sites for those educated at Chilocco.

However, since the sale of this land by the Cherokees no one tribe has been associated with this land and the children of many different tribes have been educated at Chilocco. In 1890, Congress passed the Organic Act, 26 Stat. 81. Section 9 of that act established a court system for the Territory of Oklahoma and Section 12 extended the jurisdiction of the territorial courts to all controversies arising between Indians except "controversies arising between Indians of the same tribe, while sustaining their tribal relations." Section 29 of that Act provided that the jurisdiction of the previously created United States courts would continue in the Indian Territory, although under Section 30, the judicial tribunals of the Indian nations within Indian Territory were to "retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties. . . ."

These courts were the predecessors of the courts of the State of Oklahoma and jurisdiction was transferred from

the former to the later by Section 20 of the Enabling Act. 34 Stat. 277. However, only the jurisdiction of the Oklahoma and Indian territorial courts as defined in the Organic Act was or could have been transferred to the state courts. Criminal jurisdiction of the territorial courts extended to all controversies except those between Indians of the same tribe occurring on land over which the tribe had jurisdiction, i.e., those acts committed on tribal land. Oklahoma State courts, therefore, had the same jurisdiction the courts of the other states had with the exception of prosecutions for crimes involving Indians of the same tribe committed on land over which that tribe had jurisdiction. Even though the alleged perpetrator and the victim of this crime are both members of the Ponca tribe, the Ponca tribe or the Federal Government through the Assimilative Crimes Act does not have jurisdiction over this controversy because the Ponca tribe does not have and never has had any territorial jurisdiction over the Chilocco Indian School lands.

However, it is possible that the Federal Government retained jurisdiction in certain areas concurrent with the jurisdiction conferred on the Territorial Courts and ultimately the Oklahoma state courts. Consequently, in certain circumstances both State and Federal Courts would have jurisdiction to prosecute crimes involving Indians.

The opinion of the Court of Criminal Appeals did not address these issues but held that Chilocco Indian School was a "dependent Indian community" because the Federal Government reserved the use of this land for an Indian school when the land was purchased from the Cherokee tribe. This Court has never held that land on which Indians happen to be located constitutes a "dependent Indian com-

munity" and, therefore, "Indian country" and when presented with this question it would appear, based on prior decisions of this Court dealing with similar issues, that this Court would decide the question in a manner inconsistent with the result reached by the Oklahoma Court of Criminal Appeals.

CONCLUSION

The decision of the Oklahoma Court of Criminal Appeals, embraced a substantial federal question not previously decided by this Court holding that land on which is located an Indian school constitutes a dependent Indian community because Indians reside there and the use of that land has been reserved for an Indian school. This is not the result that would be reached from a logical extension of Supreme Court decisions in this area. Further, this decision constitutes a misinterpretation of 18 U.S.C. § 1151 (b). In addition, the decision is in conflict with the decision of the United States Court of Appeals for the Tenth Circuit in *Ellis v. Page*, 351 F.2d 250 (10th Cir. 1965), which held that once land was sold by the Indians to the Government it ceased to be Indian country.

Finally, the decision of the Court of Criminal Appeals is extremely important in that it limits the enforcement of the criminal statutes of Oklahoma, exempting crimes committed by Indians on lands associated with any group of intertribal Indians. This opinion results from an incorrect interpretation of federal statutes defining Indian country as well as federal law which preceeded the establishment of the State of Oklahoma. Consequently, a jurisdictional gap

now exists in Oklahoma in that the Federal Government's criminal jurisdiction is limited to crimes committed on Indian country while the State's criminal jurisdiction is limited to prosecution of crimes not committed on Indian country as well as to crimes not committed on lands associated with Indians but which do not constitute Indian country. For these reasons the issues raised in this Petition are critical and the Petitioners pray that this Court will grant their Petition for Certiorari and reverse the decision of the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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October, 1979

CERTIFICATE OF SERVICE

I, John F. Fischer, II, one of the attorneys for the State of Oklahoma, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this _____ day of October, 1979, I served three (3) copies of the foregoing Petition for Certiorari to the Supreme Court of the United States on the several parties thereto, as follows:

Patti Palmer & Susan Work
1212 North Hudson
Oklahoma City, Oklahoma 73103

F. Browning Pipestem
404 Security National Bank Building
Norman, Oklahoma 73069

by placing same in the United States Mail postage fully prepaid.

John F. Fischer, II
Attorney for Petitioner

APPENDIX A

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

C. M. G., a juvenile,)
Appellant,)
-vs-) No. J-78-362
THE STATE OF OKLAHOMA,)
Appellee.)

— O P I N I O N —

BRETT, Judge:

The juvenile, the State, and this Court agree that the threshold determination is whether or not the Chilocco Indian School (Chilocco) is "Indian country" within the definition of 18 U.S.C. § 1151 (1970).¹ If the school is Indian country, the United States has exclusive jurisdiction over prosecution of the offense. If it is not Indian country, then the State of Oklahoma and the United States have concurrent jurisdiction to prosecute the crime charged, and this Court must deal with the allegations of error in the certification proceedings.

Title 18 U.S.C. § 1152 (1970), provides that "Except as otherwise expressly provided by law, the general laws

¹ Title 18 U.S.C. § 1151 (1970), reads as follows:

"Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, § 25, 63 Stat. 94."

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of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." Title 25 U.S.C. § 1321, ¶ (a), (1970), passed in 1968, grants to the states consent to assume, with the consent of the Indians involved, jurisdiction to prosecute crimes committed in Indian country, 25 U.S.C. § 1323 (1970), gives the consent of the United States to states to amend their constitutions or existing statutes to remove any legal impediments to the state assuming that jurisdiction. To date, the State of Oklahoma has made no attempt to repeal Art. I, § 3, of the Constitution of the State of Oklahoma, which prohibits state jurisdiction over Indian country, so the federal government still has exclusive jurisdiction over Indian country located within Oklahoma boundaries. See *State v. Littlechief*, Okl.Cr., 573 P.2d 263 (1978).

The facts in this case are not in dispute. The parties stipulated that: (1) There are 266 in-state and out-of-state students enrolled at Chilocco, all of whom have at least one-quarter Indian blood. (2) Eighty-two of Chilocco's 102 employees are Indian. (3) Chilocco is not associated with any particular tribe, and its students are members of various tribes with which they maintain ongoing relationships. (4) Pursuant to employment contracts, Chilocco provides staff houses and apartments, all but three of which are occupied by Indian employees. (5) Chilocco is funded through the Bureau of Indian Affairs, an agency within the United States Department of the Interior. The administration of the funds is through the Anadarko Area Office, Bureau of Indian Affairs, Anadarko, Oklahoma. (6) While the Anadarko Agency administers funds to Chilocco, the respective tribes and agencies are responsible for the welfare of the individual students who are subject to their authority, and the tribes and agencies provide financing for higher education and housing once the students leave the school. (7) There is an Indian health clinic located

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on the Chilocco campus. It is open three days a week and is operated by the United States Public Health Service in Pawnee, Oklahoma. The Pawnee Agency of the Bureau of Indian Affairs, located in Pawnee, approximately 70 to 75 miles from the school, provides service to the surrounding Indian community, including members of the Ponca, Pawnee, Otoe, Missouri, Kaw and Tonkawa tribes, but does not administer services to Chilocco, per se. (9) In 1934, an Indian Subsistence Homestead Colony was established on 3,000 acres of Chilocco Indian Reserve lands. It was divided into farms of about 160 acres and a common pasture of about 600 acres. (10) Houses and farm buildings for 15 homesteaders were erected for the Indian Subsistence Colony. (11) Participants in the Indian Subsistence Homestead Colony were required to sign an Indian subsistence homestead agreement with the federal government which provided that the buyer desired to become a member of the community and to occupy a homestead in the community. The agreement further provided for the use of common land and property by members of the community and required the participants to abide by applicable statutes and ordinances and administrative regulations. (12) As of 1957, six of the homesteads continued to be occupied by Indian homesteaders. Currently, none of the homesteads is occupied under the terms of the original agreement. (13) Non-Indians can be admitted and enrolled at Chilocco. (14) Legislation has been proposed to turn over the improvements of the homestead colony to the school, as the improvements have fallen into disuse, but it has not been acted upon.

The following other evidence appears. The Chilocco school Reserve is located in the northern strip of land in western Oklahoma which was commonly known as the Cherokee outlet. The Cherokee outlet was first acquired by the Cherokee Nation in the 1830's. In 1866, the United States and the Cherokee Nation agreed that:

"The United States *may settle friendly Indians* in any part of the Cherokee country west of 96°, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled: The boundaries of each of said districts to be distinctly marked and the land conveyed in fee simple to each of said tribes to be held in common or by their members in severalty as the United States may decide." (Emphasis added) 14 Stat. 799, 804, Art. 16

Pursuant to the 1866 treaty, Poncas, Pawnees, Otoes and Missouri Indians were settled in portions of the Cherokee Outlet which were sold by the Cherokees.

In 1882, the Congress of the United States authorized an Indian school to be built in the Cherokee outlet near the southern boundary of the Kansas and near the Ponca and Pawnee reservations. 22 Stat. 68, 85, ch. 163. Thereafter, on July 12, 1884, President Chester A. Arthur issued an executive order setting aside land for the Chilocco Indian Reserve with these words:

"[T]he following-described tracts of country in the Indian Territory, viz, sections 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, and the east half of sections 17, 20, and 29, all in the township No. 29 north, range No. 2 east of the Indian meridian, be, and the same are hereby, *reserved and set apart for the settlement of such friendly Indians belonging within the Indian Territory as have been or who may hereafter be educated at the Chilocco Indian Industrial School in said Territory.*" (Emphasis added) Kappler, Laws and Treaties, vol. 1, 842 (2nd ed.).

In 1891, the Cherokee Nation agreed to sell the entire Cherokee outlet to the United States. That agreement was ratified by Congress in 1893. 27 Stat. 612, 642, ch. 209. In Section 10 of that agreement, the United States agreed

to purchase from the Cherokee Nation "all the right, title, interest, and claims . . ." in the Cherokee outlet. Further, the Cherokee Nation agreed to accept payment "as a full and complete relinquishment and extinguishment of all their title, claim, and interest in and to said lands; . . ." However, the parties also agreed in Section 10 that:

"Sections thirteen, fourteen, fifteen sixteen, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight and the east half of seventeen, twenty and twenty-nine, all in township numbered twenty-nine north of range numbered two east of the Indian Meridian, the same being lands reserved by Executive order dated July twelfth eighteen hundred and eighty-four, for use of and in connection with the Chilocco Indian Industrial School, in the Indian Territory, shall not be subject to public settlement, but shall, until the further action of Congress, *continue to be reserved for the purposes for which they were set apart in the said Executive order. . . .*" (Emphasis added)

It has become a truism in Indian law that doubtful expressions in Indian treaties and Acts of Congress dealing with Indians are to be resolved in favor of the Indians. *DeCoteau v. District County Court for Tenth Jud. Dist.*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 63 S.Ct. 672, 87 L.Ed. 877 (1943). Cases in which land claimed to be Indian country was found not to be have involved land to which Indians clearly and specifically had ceded all claim, right, title, and interest to the lands without any reservation whatsoever. See *DeCoteau v. District County Court for Tenth Jud. Dist.*, supra; *Ellis v. Page*, 351 F.2d 250 (10th Cir. 1965).

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The definition of Indian country has developed over many years, and the present statutory definition of 18 U.S.C. § 1151 (1970), is a codification of prior case law. In *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913), the United States Supreme Court rejected the contention that the term "Indian country" referred only to aboriginal lands of Indians and declared that lands which were set apart as Indian reservations out of the public domain were to be considered Indian country.² In *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913), and *United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938), the United States Supreme Court held that dependent Indian communities were Indian country.³ In *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914), the Supreme Court held that Indian allotments were Indian country.⁴

Obviously, the land in question is not an allotment, and we can agree with the State that the property is not a diminished reservation of the old Cherokee Outlet.⁵ See *United States v. Celestine*, 215 U.S. 278, 30 S.Ct. 63, 54 L.Ed. 195 (1909). In light of the clear language of the treaty ratification, we cannot say, nor does the juvenile contend, that the Cherokee Nation retains any legal interest in Chilocco. That leaves only the question of whether Chilocco is a dependent Indian community.

The State cites the Eighth Circuit case of *United States v. Myers*, 206 F. 387 (8th Cir. 1913), for the proposition that Indian schools are not "Indian country." In that case, however, the school was located on land which had been

² Codified in 18 U.S.C. § 1151(a) (1970).

³ Codified in 18 U.S.C. § 1151(b) (1970).

⁴ Codified in 18 U.S.C. § 1151(c) (1970).

⁵ We do note, however, that the land was referred to by the United States Supreme Court in *Winebrenner v. Forney*, 189 U.S. 148, 23 S.Ct. 590, 47 L.Ed. 754 (1903), as the Chilocco Reservation.

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reserved from land sold by the Kiowa, Comanche and Apache tribes of Indians "for the use of the common schools, [and] for university, agricultural colleges, normal schools and public buildings of the territory and future state of Oklahoma; . . ." As the Court pointed out, there was not a reservation for the benefit of Indians, but for the benefit of the territory and future state of Oklahoma. According to the Court, Indian country is "country to which the Indians retained the right of use and occupancy, involving—under certain restrictions—freedom of action and of enjoyment in their capacity as a distinct people, unless by virtue of some reservation expressed at the time of extinguishment of such title, and clearly appearing. . . ." *supra* at 394. Citing *United States v. Celestine*, *supra*, the Court said that in order to determine whether land was Indian country, one must look at "the scope and purpose of the act creating it, and the nature of the title, use, and occupancy, how held, exercised, and enjoyed." *supra* at 394. We need not determine whether *Myers* would be decided the same today as it was in 1913; it is sufficient to point out that the land in *Myers*, while it was used as an Indian school, had not been reserved for the use of Indians when it was acquired by the United States, as was the land in the instant case. Therefore, *Myers* does not stand for the proposition that Indian schools are not Indian country.

Furthermore, we cannot agree with the State's contention that as the Cherokee Nation reserved no interest in the land in question, it cannot be considered Indian country. Looking at the cases in which it has been found that there is a dependent Indian community, and therefore "Indian country," we find that Indian country need not inure to the benefit of a single tribe, or of named tribes; nor need title to the land remain with the Indians who are to benefit from its use. In *United States v. McGowan*, *supra*, the Reno Indian Colony was located on 28.3 acres of land owned by the United States and purchased out of

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funds appropriated by Congress. The congressional purpose of the purchase was to "provide lands for needy Indians scattered over the State of Nevada, and to equip and supervise these Indians in establishing a permanent settlement." In that case, the Supreme Court said that the designation given to a community was immaterial; whether it was called a colony or a reservation, it was still Indian country.

Quoting *United States v. Pelican*, supra, 232 U.S. at 449, the Court said that the community was Indian country "simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government." In the present case, the land in question was set aside by Congress for "the settlement of friendly Indians," and the arguments of the State to the contrary, the United States could not change the use of the land to, for example, a military reservation without at least an act of Congress.

Looking at other cases which deal with the definition of Indian country, we find in *United States v. Maritime*, 442 F.2d 1022 (10th Cir. 1971), that the Court looked at "the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes and to the federal government, and the established practice of government agencies toward the area. . . ."

In *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975), the Court found that a bar operated by non-Indian defendants on non-Indian land on the outskirts of an unincorporated village within an Indian reservation was Indian country. The Court considered that the bar was located on the outskirts of Fort Washakie, Wyoming, where the Wind River Agency of the Bureau of Indian Affairs the tribal headquarters of the Wind River Tribes were located. Of the 212 families living within a 20 square mile area, 170 were Indian, 41 were non-Indian and one was mixed. The state school serving Fort Washakie had a total enrollment of 243 students, 223 of whom were

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Indian. The bar served both Indians and non-Indians, and the lands on which the bar was located were held in fee by non-Indians.

In the instant case, the land in question is owned by the United States. All the students are Indian, as are most of the employees of the school. The employees' salaries and the students' tuition are paid for by the Bureau of Indian Affairs. The fact that the Indian subsistence homestead community, which was started in 1934, was not a success, does not change the fact that the land in question had been reserved by Congress for an Indian school and for "the settlement of such friendly Indians belonging within the Indian Territory as have been or who may hereafter be educated at the Chilocco Indian Industrial School in said Territory." The land was set aside for that purpose by an executive order, that purpose was incorporated in the 1891 treaty between the Cherokee Nation and the United States, and that incorporation was ratified in 1893 by the United States Congress.

One of the United States Supreme Court's latest statements on the definition of Indian country is found in *United States v. John*, ___ U.S. ___, 98 S.Ct. 2541, ___ L.Ed.2d ___ (1978), in which the Court once more cited with approval the *McGowan* case, supra, 302 U.S. 538, for the proposition that in determining what was Indian country, one looked to see that the "fundamental consideration of both Congress and the Department of the Interior . . . has been the protection of a dependent people." The Court in *John* reiterated the test set out in *Pelican*, supra, 302 U.S. at 539, and followed in *McGowan*, supra, 232 U.S. at 449, that it must be determined whether the land in question "had been validly set apart for the use of the Indians as such, under the superintendence of the Government."

Looking at the historical background of the land in question in the *John* case, in 1830 the Choctaw Indians and the United States signed a treaty providing that the

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Choctaws would cede to the United States all lands still occupied by them east of the Mississippi. The agreement also provided for a method by which Choctaws who wished to remain in Mississippi could receive allotments of land. Many Choctaws remained in Mississippi, and in 1918 Congress passed an appropriation bill which included funds for an agency to provide medical care for the Choctaws remaining in Mississippi, for the maintenance for schools, and for the purchase of land and farm equipment. In the 1930's, the federal government discontinued the allotment program, and in 1939 Congress passed an act providing that title to all the land previously purchased for the Mississippi Choctaws would be "in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior." In 1944, the Assistant Secretary of the Department of the Interior officially declared these lands in question to be a reservation.

According to the United States Supreme Court, there was no reason why the land which had been purchased for the Mississippi Choctaw Indians had not become a reservation at the time it was declared by Congress to be held in trust by the United States for the benefit of those Indians. However, if there were any question about the land being a reservation, it was completely clarified by the 1944 proclamation stating that the land was a reservation.

The Court stressed that the land was Indian country, even if it were true, as the State of Mississippi argued, that the Choctaws residing in Mississippi had become fully assimilated into the political and social life of Mississippi, that the United States had abandoned its supervisory authority over the Mississippi Choctaws, and that for some time Mississippi's jurisdiction over that land had gone unchallenged. The land was, and had been, Indian country, and Mississippi had never had criminal jurisdiction there. We think *John*, therefore, disposes of the State's suggestion

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that the State of Oklahoma has jurisdiction over crimes that occur at Chilocco, because the United States has elected not to prosecute them.

Finally, there is the case of *Sac & Fox Tribe of Mississippi in Iowa v. Licklider*, 576 F.2d 145 (8th Cir. 1978). That case showed that in 1842 the Sac and Fox Tribe ceded all its land west of the Mississippi to the United States and agreed to move to a reservation in Kansas. Some members of the Fox Tribe and of the Sac Tribe returned to Iowa, and in 1856 the Iowa Legislature consented to their continued residence. In 1857, the tribes purchased a small tract of land, and title was taken by the Governor of Iowa in trust for them. In 1865, the federal government sent an Indian agent to Iowa to supervise the tribe, and in 1867 Congress approved the payment of treaty annuities to the tribe in Iowa. Starting at least as early as 1874, the Bureau of Indian Affairs spent money for the education of members of the tribes in Iowa and constructed a boarding school in Toledo, Iowa. In 1896, the United States accepted and assumed jurisdiction over the Sac and Fox Indians in Iowa. Since 1896, the Bureau of Indian Affairs has spent funds for social services, land management, employment assistance, health services, and police services, and education for the tribes. Finding that the area was Indian country, the Eighth Circuit said that there had been a "de facto reservation" there since as early as 1865.

In the instant case, there is a tract of land which was specifically reserved for the settlement of friendly Indians at the time the Cherokee outlet was ceded to the United States. Therefore, we must say that Chilocco meets the definition of a dependent Indian community and that the State of Oklahoma has no jurisdiction over crimes committed there. We make this holding reluctantly, but, as the Supreme Court stated in *United States v. Celestine*, supra, 235 U.S. at 290, "[I]t is for Congress to determine when and how that relationship of [national] guardianship shall be abandoned. It is not within the power of the courts

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to overrule the judgment of Congress. . . ." As the Supreme Court stated more recently in *DeCoteau v. District County Court for Tenth Jud. Dist.*, supra, 420 U.S. at 450, "Congress and the tribe spoke clearly. Some might wish they had spoken differently, but we cannot remake history."

As we find that the State of Oklahoma has no jurisdiction to prosecute crimes which occur at Chilocco, the certification proceedings in this case were void *ab initio*, and we will not consider any errors alleged to have occurred in those proceedings. Accordingly, we **WE REVERSE** and **REMAND** this case with instructions to **DISMISS**.

AN APPEAL FROM THE DISTRICT COURT,
KAY, COUNTY, OKLAHOMA,
HONORABLE ROGER MULLINS, JUDGE

C.M.G., appeals from an order of the Juvenile Division certifying him to stand trial as an adult for the offense of Murder in the First Degree. **REVERSED** and **REMANDED** with instructions to **DISMISS**.

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OPINION BY BRETT, J.
CORNISH, P. J., CONCURS
BUSSEY, J., CONCURS.

APPENDIX B

[Filed Stamp omitted in printing]

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

C. M. G., a juvenile,)
Appellant,)
-vs-) No. J-78-362
THE STATE OF OKLAHOMA,)
Appellee. ,)

ORDER DENYING PETITION FOR REHEARING
AND DIRECTING THE ISSUANCE OF MANDATE

NOW, on this 3rd [sic] day of July, 1979, the Court having examined the Petition for Rehearing and Briefs in Support thereof and being fully advised in the premises, finds that the Petition for Rehearing should be, **DENIED**.

The Clerk of this Court is directed to issue the Mandate **FORTHWITH**.

IT IS SO ORDERED.

WITNESS OUR HANDS, AND THE SEAL OF THIS COURT, this 23rd day of July, 1979.

(s) Tom R. Cornish
TOM R. CORNISH, PRESIDING JUDGE

(s) Tom Brett
TOM BRETT, JUDGE

ATTEST:

(s) Ross N. Lillard, Jr.
CLERK